Supreme Court, U.S.
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No. 08-1462

In The Supreme Court of the United States

MARGARET YORK, WILLIAM NASH and VICTOR TURNER,

Petitioners,

v.

RICHARD ROBINSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL A. MCGILL
Counsel of Record
DIETER C. DAMMEIER
LACKIE, DAMMEIER & MCGILL APC
367 North Second Avenue
Upland, California 91786
(909) 985-4003

Counsel for Respondent Richard Robinson

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Under the First Amendment analysis in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), should a district court decide material disputes over the scope and content of a public employee's job duties as a matter of law on summary judgment?

2. Despite the absence of any meaningful circuit split, should review be granted to advise courts on what factors should and should not be included in its inquiry into the scope and content of an employee's official job duties?

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INTRODUCTION

In *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), this Court held that speech made by a public employee pursuant to his official job duties is not entitled to First Amendment protection. The Court made clear that the inquiry into whether the employee spoke pursuant to his official job duties is a "practical one" that involves a factual examination of "the duties an employee actually is expected to perform." *Id.* at 424.

Applying this standard, the Ninth Circuit affirmed the District Court's decision that there were genuine and material disputes as to the scope and content of the respondent's job responsibilities rendering it impossible to determine on summary judgment whether he spoke pursuant to his official responsibilities or as a citizen. Pet. App. 10. Claiming a circuit split, petitioners argue that review is warranted to resolve the issue of whether the scope of a public employee's job duties is a question of law or a question of fact.

Of significance is the fact that this Court just recently denied review of this exact same issue in *City of Maywood v. Densmore*, 2009 WL 481278. In this case, petitioners make the same arguments and cite the same cases. Although some cases cited by petitioners hold that the ultimate question of whether an employee was speaking as an employee or a citizen is a question of law, none of them resolve the underlying dispute about the employee's actual job duties

at the summary judgment stage. Here, both the District Court and the Ninth Circuit recognized that there was conflicting factual evidence as to what duties Robinson was expected to perform. As a result, the court below correctly denied summary judgment. Since there is no meaningful split in the circuits, there is no compelling reason for this Court to grant review and advise courts on case-specific criteria to apply when determining whether an employee spoke as an employee or as a citizen.

STATEMENT OF THE CASE

Respondent Richard Robinson was employed as a police sergeant with the County of Los Angeles. Pet. App. 34. Between 2002 and 2006, Robinson disclosed numerous instances of policy and law violations by other officers within the County. *Id.* at 34-35.

His disclosures included the following:

1. Testifying against the County in a May 2002 class action lawsuit alleging that the County engaged in systematic race discrimination and harassment against officers;

2. Reporting possible corruption by an officer who was allegedly working for an outside employer while "on the clock" for the County;

3. Reporting drinking on duty by sworn police officers while driving County vehicles;

4. Following up with Internal Affairs and others in December 2003 and February 2004 when it appeared that nothing was being done regarding his reports of corruption and on-duty drinking;

5. Reporting the display of distinctive tattoos on the bodies of several officers working in the training unit, reminiscent of the questionable "Viking" tattoos sported by members of the Los Angeles Sheriff's Department, and suggesting the possibility of racist and/or anti-Semitic attitudes by members of the unit;

6. Reporting a possible battery on a police explorer by an officer;

7. Filing an official complaint with Internal Affairs regarding possible racial and ethnic discrimination; and

8. Reporting a possible use of excessive force incident. *Id.* at 34-35.

In addition, after receiving favorable work reviews over the course of three years, Robinson took a promotional examination in 2003 to promote to police lieutenant. *Id.* at 4. He was eventually placed in the highest band of candidates, with nine other candidates. Pet. App. 4; Appellant's Excerpts of Record in the Ninth Circuit (Ct. App. ER) at Vol. IV, 526.

Between 2003 and 2006, eight of the ten candidates from Robinson's band (band I) were promoted and three candidates from the second band were promoted. However, Robinson was not one of the candidates selected for promotion and the promotional list expired in 2006. *Id.*

During the promotional process, Robinson spoke with various officials, including petitioners William Nash and Victor Turner, to determine why he wasn't being selected for promotion. At the time, Nash and Turner were bureau chiefs for the County and were directly below the chief of police in the chain of command. As bureau chiefs, Nash and Turner were intimately involved in the decision-making process for promotional selections. Pet. App. 3; Ct. App. ER at Vol. IV, 527, 611.

Essentially, Nash and Turner told Robinson that the aforementioned instances where Robinson "blew the whistle" and disclosed internal misconduct were being held against him. Ct. App. ER at Vol. IV, 571. Nash testified that Robinson's disclosures "could cause some concern with promoting him to lieutenant" and suggested that "if you didn't bring so many issues forward or didn't bring such issues, as many issues to light, maybe that might help in terms of your getting promoted to lieutenant." *Id.* Nash testified that Robinson's response to what Nash advised him was "Well, so you think that maybe I should back off or slow down?" *Id.* at 581. Nash then admitted he told Robinson "[i]t might help," or something along those lines. *Id.* at 580. Nash concluded by telling

Robinson that he "hoped that this conversation wouldn't come back to bite [him] one day." *Id.* at 582.

Turner likewise advised Robinson that he could not promote him because of his prior reporting of misconduct and candidly advised Robinson that "sometimes things are better swept under the rug." *Id.* at 611. On a separate occasion, Turner was overheard advising someone that "Sergeant Robinson will never promote because he makes too many complaints against supervision. He reports too much misconduct." *Id.* at 609.

In addition, two police captains with the County each made similar statements. Captains Hector Lemus and Steve Lieberman also told Robinson that he was not going to be promoted due to his disclosures. *Id.* at 612.

After failing to obtain a promotion, Robinson filed this action alleging that he had been denied promotion in retaliation for exercising his First Amendment rights. The defendants moved for summary judgment, arguing that Robinson's reports were not protected speech because they were made as part of his professional duties as a peace officer. More specifically, the defendants argued that because the County maintained a written policy stating that an officer must report "information" that "might indicate the need for Office of Public Safety actions," Robinson's speech was automatically made pursuant to his professional duties and unprotected as a matter of law.

The District Court declined to apply the defendants' rigid and per se approach, and instead denied the motion finding genuine issues of material fact on the scope of Robinson's job duties and holding that a violation of a written chain of command policy was not dispositive, but merely one of the factors to be considered. Pet. App. 38-39. Defendants Margaret York, William Nash and Victor Turner then appealed the District Court's denial of summary judgment on the issue of qualified immunity.

On January 8, 2009, the Ninth Circuit affirmed the District Court's decision again reiterating that there are genuine and material factual issues in dispute as to the scope and content of Robinson's job duties. In recognition that the inquiry into one's job duties requires a "practical one" that involves a factual examination of "the duties an employee actually is expected to perform," the Ninth Circuit reserved judgment until after the fact-finding process. Pet. App. 19, 27.

Upon application of respondent seeking publication of the court's decision, on April 27, 2009, the Ninth Circuit withdrew its memorandum and issued a published opinion. Pet. App. 1.

REASONS FOR DENYING THE PETITION

I. There Is No Meaningful Circuit Split Over Whether The Scope Of A Public Employee's Job Duties Is A Question Of Law Or A Question Of Fact.

1. Petitioners' primary argument for review is that there is a circuit split over whether the scope of a public employee's job duties is a question of law or a question of fact. Petitioners claim that courts have applied varying and inconsistent criteria in determining an employee's job duties and that there is resulting uncertainty and confusion. However this is not the case.

Although some courts describe the *ultimate question* of whether a public employee is speaking as a citizen or as an employee as a question of law, no case cited by petitioners hold that where there is a dispute over the scope and content of an employee's actual job duties – as was found here by the District Court and affirmed by the Ninth Circuit – that dispute should be resolved by a court.

Petitioners contend that the decision below is in conflict with the First, Fifth, Tenth, Eleventh and D.C. Circuits. For example, petitioners contend that the decision below is in conflict with D.C. Circuit's opinion in *Wilburn v. Robinson*, 480 F.3d 1140 (D.C. Cir. 2007). However, the case presented no factual disputes with regard to the scope and content of the employee's job duties, and in fact, the employee believed that her job required her to make such

disclosures. *Id.* at 1150. Similarly, the petitioners' reliance upon the Fifth Circuit case, *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008) is also inapplicable. In *Charles*, the court stated that the *ultimate question* of whether "speech is entitled to protection" is a matter of law. *Id.* at 513, n. 17. Again, the court did not mention any material disputes over the employee's job duties, and specifically found that the employee was not speaking as an employee under any "conceivable job duties." *Id.* at 514. The court had no occasion to comment upon the nature of the inquiry if any factual dispute did exist. More importantly, in a post-*Charles* case involving an employee whose official job duties were unclear, the court denied summary judgment. *See Williams v. Riley*, 275 F.Appx. 385 (5th Cir. 2008).

The petitioners also rely on *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007). Although the court stated that the ultimate question of whether an employee is speaking pursuant to his official job duties is a question for the court, the court was not faced with a case involving a factual dispute as to the scope and content of the employee's job duties. However, the court noted that it was "viewing the evidence in the light most favorable to the plaintiffs," *id.* at 1204, suggesting that there may be times when summary judgment would be inappropriate due to a factual dispute. From the First Circuit, the petitioners rely upon *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007) and *Lewis v. City of Boston*, 321 F.3d 207 (1st Cir. 2003). In *Curran*, the

First Circuit specifically found that "the material facts were not disputed" and thus "[t]he issues were ones for the court to decide." *Curran*, 509 F.3d at 45. *Lewis* is a pre-*Garcetti* decision and provides no insight into whether the *Garcetti* inquiry is one of law or fact.

Finally, petitioners cite several Eleventh Circuit decisions in passing, including *Boyce v. Andrew*, 510 F.3d 1333 (11th Cir. 2007), *Battle v. Bd. of Regents for the St. of Ga.*, 468 F.3d 755 (11th Cir. 2006), *Morris v. Crow*, 117 F.3d 449 (11th Cir. 1997), *Burton v. City of Ormond Beach, Fla.*, 301 F.Appx. 848 (11th Cir. 2008), and *Schuster v. Henry County Ga.*, 281 F.Appx. 868 (11th Cir. 2008). Each of these cases, like the others, do not involve situations where the scope and content of the employee's job duties are unclear and where factual disputes exist. In fact, in *Battle*, the court noted that the employee's speech was clearly a part of the employee's official job duties. *Battle*, 468 F.3d at 761. In *Burton*, the Court found that "no 'serious debate' exists" and that the speech was pursuant to his job duties. *Burton*, 301 F.Appx. at 852. In *Schuster*, the employee admitted he had an obligation to engage in the speech. *Schuster*, 281 F.Appx. at 870. Furthermore, *Morris* is a pre-*Garcetti* case and is of no support to the petitioners' position.

Contrary to the petitioners' assertion, the appellate courts are not squarely at odds over this issue. Petitioners have not demonstrated that the appellate courts that describe the ultimate question as being a "matter of law" would resolve cases at summary

judgment when those cases involve factual disputes about what duties an employee is actually expected to perform. The Ninth Circuit is in line with every other circuit in that once the factual dispute over the scope of the employee's job duties is resolved, the "'ultimate constitutional significance of the facts as found' is a question of law." *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009), quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). Accordingly, when no factual disputes do exist as to the scope of the employee's job, the Ninth Circuit has routinely decided the ultimate issue of whether the speech was made as a citizen or an employee as a matter of law. *See White v. Nevada*, 312 F.Appx. 896 (9th Cir. 2009); *Brown v. Hawaii*, 2009 WL 330209. The Third Circuit, which the petitioners claim is on the same side as the Ninth Circuit in the purported split, does the same. *See Gorum v. Sessons*, 561 F.3d 179 (3rd Cir. 2009). Since there is no meaningful circuit split here, review is unnecessary.

2. Banking on its purported circuit split, petitioners ask this Court to intervene and declare that the scope of an employee's job duties should be decided by the court as a matter of law. However, deciding as a matter of law that Robinson's speech was made pursuant to his official job duties would be inconsistent with *Garcetti*'s pronouncement that the proper inquiry is "a practical one." *Garcetti*, 547 U.S. at 424. In fact, petitioners' entire claim that Robinson spoke pursuant to his official job duties is predicated

almost exclusively on a written policy that arguably does not apply to Robinson's disclosures.[1] *See* Ct. App. ER at Vol. II, 37-40. *Garcetti* holds that the proper inquiry must focus on "the duties an employee is actually expected to perform," and not the "[f]ormal job description." *Garcetti*, 547 U.S. at 424-25.

Questions about what duties a public employee is expected to perform, when in genuine dispute, involve precisely the "application of those ordinary principles of logic and common sense experience which are ordinarily entrusted to the finder of fact." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501, n. 17 (1984). Although the ultimate question may be a legal question for a judge to decide, subsidiary factual questions are appropriately addressed to the finder of fact. *Miller v. Fenton*, 474 U.S. 104 (1985).

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[1] Petitioners also suggested that Robinson spoke pursuant to his official job duties because he is a police officer and "police officers are literally on duty 24 hours a day under California law." *See* Ct. App. ER at Vol. II, 38. Recognizing that the argument would essentially eradicate First Amendment protection for police officers who blow the whistle, petitioners have abandoned that claim on appeal.

II. There Is No Meaningful Circuit Split Over The Factors Courts Have Used In Determining Whether Public Employee Speech Falls Within One's Official Duties.

Attempting to breathe life into its petition, petitioners claim that the circuit courts have applied varying or inconsistent factors in deciding whether a public employee's speech is taken pursuant to the employee's official job duties. This is simply not true.

Petitioners argue that several courts have held that whether the employee directed the speech to supervisors or others within the chain of command determines whether the particular communication falls within the employee's official duties. By contrast, petitioners claim that the District Court rejected petitioners' contention that Robinson's various complaints of misconduct were made pursuant to his job duties because he directed them internally within County. Pet. 33. However, the petitioners never made that contention. *See* Ct. App. ER at Vol. II, 37-40. Petitioners never argued that Robinson's speech was made pursuant to his job duties because he directed it to the County. *Id.* Since petitioners never made such an argument, they failed to preserve it for review. More importantly, even if the District Court had rejected the argument – which it did not – the issue does not merit review by this Court.

Next, petitioners argue that circuit courts have inconsistently analyzed various regulations, policies or statutes regarding employee's speech. Petitioners

argue that the two Tenth Circuit cases, *Casey v. West Las Vegas Independent Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007) and *Battle, supra*, conflict with two Seventh Circuit decisions, *Chaklos v. Stevens*, 560 F.3d 705 (7th Cir. 2009) and *Trigillo v. Snyder*, 547 F.3d 826 (7th Cir. 2008). However, petitioners completely fail to address how these purported inconsistencies apply to this case. Petitioners do not even argue that the District Court or Ninth Circuit created a split in authority. Seeking review of an issue not presented in this appeal is tantamount to seeking an advisory opinion. More importantly, the various regulations, policies and statutes at issue in the cited cases are far from identical and really involve a matter of comparing apples to oranges. Each court reviewed the precise language in light of the actual job duties the employee performed. The courts did not utilize "divergent approaches." They simply weighed the evidence and reached different results.

Furthermore, petitioners argue that courts have used different approaches with regard to an employee's "special knowledge" of the information that is disclosed, and presumably, some sort of conflict exists. Again, petitioners completely fail to link this claim to any relevant aspect of this case – petitioners do not contend that the Ninth Circuit's decision is in conflict with other circuits on this point.[2] Petitioners

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[2] Petitioners conceded that virtually all of Robinson's speech occurred while he was off-duty. *See* Ct. App. ER at Vol. IV, 38. Accordingly, petitioners did not make the argument to the

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simply argue in the abstract that because some courts placed a greater or lesser emphasis on the employee's specialized knowledge, guidance from this Court is necessary. Moving beyond mere argument, petitioners' cases do not support their claim. In *Williams v. Dallas Independent Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007), the speech was made by an athletic director who revealed fraud in a budget that he was responsible for managing. In *Gorum v. Sessons*, 561 F.3d 179 (3rd Cir. 2009), the speech was made by a tenured professor acting as an advisor and speaking as he was paid to do. Neither of these cases conflict in any meaningful way with the present matter, where the petitioners concede Robinson's speech occurred off-duty and where a factual dispute exists as to Robinson's actual job duties.

Finally, petitioners argue that the appellate decision below is erroneous because it adopts an approach "squarely at odds with *Garcetti*." Pet. 38. Petitioners suggest that the District Court mistakenly assumed that Robinson's speech was not made pursuant to his job duties simply because Robinson was threatened on numerous occasions to not engage in his speech. *Id.* However, petitioners miss the point. The District

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District Court that Robinson's speech was unprotected because it derived from his "special knowledge" as a peace officer. In fact, petitioners' argument has all along been that Robinson's speech is unprotected because County policy required him to make the speech. *See* Ct. App. ER at Vol. IV, 37-40. As such, petitioners have waived this argument on appeal.

Court simply relied, in part, on the threats as conflicting evidence of Robinson's job duties. The District Court properly denied summary judgment because evidence existed that Robinson's job did not require him to report misconduct. The decision in no way conflicts with *Garcetti* or any decisions from any other circuit courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL A. MCGILL
Counsel of Record
DIETER C. DAMMEIER
LACKIE, DAMMEIER & MCGILL APC
367 North Second Avenue
Upland, California 91786
(909) 985-4003

Counsel for Respondent Richard Robinson